not be entitled to any. I am also greatly indebted to both learned counsel for the wealth of authority to which they directed my attention during the hearing. In my view that I have taken it is unnecessary for me to deal with any of them, but since I have spent several hours in studying them I propose to hazard two *obiter dicta*. The first is that cases in regard to the nature of a lien decided under section 80 of the Registration of Titles Enactment, 1911, afford no safe guidance to the construction of section 134 of the Land Code which contains the present law on the subject. The second is that Privy Council decisions on systems of Land Registration in force in other British Possessions, Colonies and Dominions, and even on Enactments formerly in force in Federated Malay States, are not always applicable to the provisions of our present Land Code. For example, at p. 116 of *Hogg* on Registration of Title to Land throughout the Empire the following passage occurs in reference to the Federated Malay States on which Mr. Jeff placed special reliance:—

"In the Federated Malay States there is a stringent enactment making transactions by non-statutory methods 'null and void and of no effect'. (F.M.S. 1911, section 5). This is to be construed as merely depriving the unregistered instrument of any operation as a transfer or incumbrance, and does not interfere with its operation as a contract [*Haji Abdul Rahman* v. *Mohamed Hassan, supra,* and *Loke Yew* v. *Port Swettenham Rubber Co., supra*]. The right to be registered conferred by such an instrument is to be treated as an assignable right of property thus placing such a right higher than a mere contract [*Loke Yew* v. *Port Swettenham Rubber Co., supra,* and *Howard* v. *Miller, supra*]."

This last sentence about the right to be registered being treated as an assignable right of property does not seem to me to be applicable to either of the unregistered memoranda of transfer in this case: see in particular section 85(ii) of the Land Code.

Action dismissed.

---

[203] JOHORE REPORTS

QUAH HONG LIAN NEO v. SEOW TEONG TECK & ORS.

[O.C.J. (Mills J.) April 25, 1936]
[Johore Civil Suit No. 4 of 1935]

Land Enactment, 1910, Part V — Forged transfer — Bona fide registered chargee for value from registered transferee.

The original plaintiff, Tan Keng Neo was the executrix and devisee in trust of Seow Eng Tin deceased and, as such, was registered as proprietor as representative of the lands comprised in Johore Grants 12364 and 12365. The 1st defendant obtained possession of the titles by a trick. He procured a woman to impersonate Tan Keng Neo and to execute a forged transfer of the lands to himself. Immediately thereafter he, purporting to act as registered proprietor, executed a first charge in favour of the 2nd defendant to secure advances on current account. Thereafter this transfer and first charge were registered. Subsequently the 1st defendant executed a second charge to the 2nd defendant to secure further advances, and this charge also was registered. Subsequently the 1st defendant executed a third charge to the 3rd defendant to secure advances on current account. Thereafter this transfer and first charge were registered. Subsequently the 1st defendant executed a third charge to the 3rd defendant to secure advances on current account. This also was registered.

The 1st defendant absconded.

The 2nd defendant proved that he had given value for his charge *bona fide* and without notice of the fraud.

The 3rd defendant did not prove that he had given value for his charge *bona fide* and without notice of the fraud.

Possession of the property remained with the original plaintiff.

Neither the plaintiff nor the 2nd or 3rd defendant was negligent.

The original plaintiff, having discovered the frauds, brought suit claiming *inter alia* to have the forged transfer and the three charges declared void as against her and set aside and to have the register rectified. She died during the hearing, and the suit was carried on by her successor, the substituted plaintiff.

Held: the plaintiff was entitled to succeed.

(1) The "fraud," referred to in the concluding clause of section 59 of the Land Enactment, 1910, against which the Court has jurisdiction to relieve is not confined (as it is in section 90H.) to fraud to which the purchaser is proved to be a party.

(2) The forged transfer to the 1st defendant was a nullity. *Gibbs* v. *Messer*, [1891] App. Cas. 257 followed.

(3) As the 1st defendant obtained no rights by virtue of the forged transfer, he had no rights, by reason of the maxim *Nemo dat quod non habet*, to hand on to the chargees. Therefore the charges were nullities, at any rate so far as they affected the land supposed to be charged.

(4) On a true construction of section 59 of the Land Enactment, the land did not pass to the chargor, notwithstanding the registration of the forged transfer. That transfer, being a forgery, was not an "instrument" and no title under section 59 could arise out of it.

(5) If, however, the land did pass under section 59, the Court, in exercising its jurisdiction in fraud, ought to prefer the equity of the plaintiff, as being prior in time, to the equities of the 2nd and 3rd defendants.

(6) The 2nd and 3rd defendants could not rely on the legal estate because, even if it be assumed that registration of the charges was equivalent to getting in the legal estate in unregistered land, the chargor here had no title and, in such a case, the legal estate would only afford protection if clothed with possession.

(7) A grant in Johore does not confer an indefeasible title on the grantee.

(8) It depends on the terms of the Enactment how far the Legislature intends that people shall be able to rely on the Register. The Johore Enactment is not modelled closely on the Australian Torrens Acts and substantially differs from them. In particular, except in the case of Court sales under section 83 and section 90H, the Enactment contains no provision conferrig idefeasibility of title or State warranty of title.

TRIAL OF ACTION.

The further facts appear from the judgment.

K. K. O'Connor for the plaintiff.

The transfer to the 1st defendant was a forgery. Forgery (except in cases where the plaintiff is estopped from averring the forgery) is a nullity and passes nothing. The plaintiff can say *non est factum*. [*Cooper* v. *Vesey*, 20 Ch. D. 611 (C.A.)]. Therefore the 1st defendant got nothing under the transfer, and his registration as proprietor could, and would have been set aside at the suit of the plaintiff. Apart from any title which the register might enable him to confer, he could confer no title. *Nemo dat quod non habet.*

The main question is: — Did the fact that the 1st defendant became registered as proprietor, although the transfer to him was forged, enable him to make charges to the 2nd and 3rd defendants which would be valid as soon as registered by them? In other words, does a *bona-fide* transferee or chargee for value, taking from

a transferor or chargor who got on the register by forgery, get a new title rooted in the register when he registers his transfer or charge? That depends upon whether or not the Johore Land Enactment warrants, or makes indefeasible, the title of a *bona-fide* registered transferee or chargee for value dealing on the faith of the register. The question is to be answered by considering the provisions of the Johore Enactment itself. [*Commissioner of Stamps* v. *Oei Tjong Swan,* [1933] App. Cas. 387; [1933] S.S.L.R. 463; [1933] M.L.J. 108]. And it is necessary to approach it, free from preconceived ideas of what Registration of Title means in other jurisdictions. The Johore Enactment does not contain any such warranty of title, though numerous enactments in other jurisdictions do. Registration of Title Enactments in other jurisdictions and cases thereon are only useful in so far as their provisions are substantially reproduced in the Johore Enactment.

He referred to the Johore Land Enactment, Part V, section 56A definitions of "charge," "Dealing," [204] "Proprietor," "Transfer." "Deal- [204] ing" is very wide. "Transfer" means the passing of land by act of parties. Under section 57, land can be dealt with at all except in accordance with the provisions of this part: and every attempt to transfer or charge or deal with the land except in accordance with such provisions is to be null, void and of no effect.

Section 58 regulates priorities.

Section 59 makes registration compulsory.

The words "Upon registration in manner hereinbefore provided the land specified in such instrument shall pass, or as the case may be shall become liable as "security" must mean "upon registration of an instrument otherwise valid, the land shall pass or shall become liable, etc."; because an instrument not in accordance with Part V — e.g. not executed by the "proprietor" where Part V requires it to be so executed — would be null and void and of no effect under section 57. That is the combined effect of sections 57 and 59.

It is not the registration, but the *act of the parties* which passes the land, or renders it liable, *upon* registration. See the wording of section 59 and the definitions of "Transfer" and "Charge." If the act of the parties is invalid, registration does not validate it, unless there is some other provision which says so. There is none in Johore.

Further, section 59 is expressly made subject to the jurisdiction of the Court on the ground of fraud. *A fortiori* for forgery.

Section 60. The registered proprietor is the only person who can execute a transfer. The transfer here was not executed by the registered proprietor, but by someone impersonating her. It was not in accordance with Part V, and was null void and of no effect under section 57. He referred also to sections 62, 63 and 67 and to section 20C of the Land Enactment Amendment, 1933.

An essential element in a system of Registration of Title, properly so called, is that registration acts in some degree as a State warranty of title. The title of a registered proprietor is expressly declared to be indefeasible except in certain specified cases — e.g. fraud. And it seems that all the Torrens systems confine the fraud which will upset the title of the registered proprietor to fraud to which he is party or privy. In many jurisdictions Certificates of Title are issued which are declared to be conclusive as to ownership, and sometimes there is an assurance fund to indemnify persons aggrieved by the operation of the statutes. In many jurisdictions it is also provided (as in Johore — section 59) that instruments are to be ineffectual till registered and that the land passes only on registration. It is not that provision, however, which protects the *bona fide* registered transferee, but the express provisions (which do not exist in Johore) that his title is to be indefeasible except (*inter alia*) for fraud to which he was party or privy. *Hogg* on Registration of Titles (Australian Torrens System) 1905 p. 106. *N.S.W. Real Property Act,* 1900, sections 40, 41(1), 43; pp. 184, 188. *Queensland Real Property Act,* 1861, sections 33, 44; pp. 275, 278, 281. *New Zealand Transfer Act,* 1885, sections 55, 56, 65, 77; sections 67, 68, 69, 70; pp. 429, 461. *Tasmania Real Property Act,* 1862, sections 33, 135, 136; pp. 517, 575, 578, 523, 525. *Victoria Land Transfer Act,* 1890, sections 69, 63, 74, 89, 94. So in Canada, *Thomson* on Canadian Torrens Systems, pp. 428, 431. *Manitoba Act,* 1902 ,sections 71, 80, 81, 83; pp. 484, 524. *Saskathchewan Land Titles Act,* 1906, sections 65, 71, 169; p. 564. *Alberta Land Titles Act,* sections 41, 42, 44.

So in the F.M.S. *Registration Titles Enactment, 1911. Voules* Vol. II, p. 194, section 5 — Johore, section 57, section 7, (issue of certificates of title), section 8. Certificates of Title to be conclusive, except for fraud to which owner is party or privy. There are no corresponding provisions in the Johore Enactment. These provisions go back to 1891. *Selangor Regulation 4 of 1891,* sections 6 and 7. Section 25 of Registration of Titles Enactment, 1911 corresponds with Johore section 59; but without the ending relating to the Court's jurisdiction for fraud. In the F.M.S. this appears in section 88, as a general provision which cannot curtail the particular provision of section 8. Section 21 is the priority section in the F.M.S. Enactment. See also the last half of section 30, added later, giving conclusive effect to a memorial of transfer. This would have been unnecessary if section 25 were effectual to give an indefeasible title.

It is very necessary, when considering the various cases to realise that the statutes on which they depend contain an express warranty of the registered title, which the Johore Enactment does not.

He referred to: — *Gibbs* v. *Messer,* [1891] App. Cas. 248, 253, 254, 257. The statute *provides* that the register shall be conclusive. *Lim Pang Geok* v. *Sokalingam Chetty,* Selangor C.S. 249/07. *Innes,* p. 90. It was argued that section 25 (Johore, section 59) was sufficient but that argument was rejected. *Ong Lian* v. *Tan Eng Jin* (1917), 1 F.M.S.L.R. 325 is a decision on an enactment very different to the Johore Enactment. Sections 7 and 8 are expressly relied on in the judgment. The same result would not have been arrived at if the Enactment had not contained those sections. As to the jurisdiction in fraud, even in Torrens jurisdictions, the Court applies the ordinary principles unless

precluded by words of the statute. *Thom* on Canadian Torrens Systems, pp. 148, 149. *A fortiori* in Johore where section 59 expressly preserves the jurisdiction. The decision in *Assets Co. Ltd.* v. *Mere Roihi*, [1905] App. Cas. 176 depends on the express words of the statute (p. 202). *Attorney-General* v. *Odell*, [1906] 2 Ch. 47 was decided on a different statute.

[205] [205] So far as is known this point has not been decided in Johore. In *Khoo Cheong Puay* v. *Oversea Chinese Bank*, [1935] M.L.J. 93 the transfer to the bank had not been registered, but it was held that the bank could and did give a good title to the company, to be completed by registration.

The onus will be on the 2nd and 3rd defendants to prove that they transacted with the 1st defendant *bona fide* and on the faith of the register. The first charge cannot have been taken in reliance on the register because the 1st defendant was not registered when he made it, and most of the money had been advanced previously.

The transfer to the 1st defendant was a forgery. Therefore it was a nullity not only (a) under the ordinary rule, because it was not the plaintiff's act; but also (b) because persons who transact with a forger do not transact on the faith of the register (*Gibbs* v. *Messer*, [1891] App. Cas. 248, 254, 255 and *Lim Pang Geok* v. *Sockalingam Chetty, Innes*, p. 91); and (c) because it was not executed by the registered proprietor in accordanc with section 60 of the Land Enactment and was null, void and of no effect under section 57. In Johore land passes *inter vivos* by act of parties upon registration of an instrument. If the so called "instrument" is a nullity and of no effect, no land passes. Therefore no land passed under the forged transfer to the 1st defendant. Therefore he could not charge what he had not got. The 1st defendant, however, became registered as proprietor. It is not admitted that he became the "proprietor" within the definition, because "proprietor" means "the person registered *under this part*" as the owner of the land. If that means in accordance with this part, the 1st defendant was never registered in accordance with Part V, because what has to be registered is an "instrument" (section 57(ii), section 59), and the document which was registered was not an "instrument," but a nullity and expressly declared by section 57 to be of no effect. But, even assuming that the 1st defendant became the "proprietor" within the definition and was qualified to execute charges which, upon registration, would render the land liable as security under section 59, that section, is expressly made subject to the Court's unfettered jurisdiction in fraud. Unless the Court finds something in the Enactment to the effect that the registered interest which a *bona-fide* transferee or chargee who takes from a person who has, by forgery, displaced the prior registered title of the true owner, is to be preferred to the title of the true owner, effect should be given to the rule that forgery is a nullity and of no effect. The land has never passed from the plaintiff and she has never charged it. In Johore a transferee or chargee takes expressly subject to the Court's unfettered jurisdiction in fraud. Titles in Johore are not independent. *Bona fide* transferees and chargees do not get new titles *Caveat emptor* applies.

Mundell (*Battishill* with him) for the 2nd defendant. — It is admitted that as the transfer of The Good Hope Rubber Estate was not signed by Tan Keng Neo, the executrix of the will of Seow Eng Tin, but was executed by the 1st defendant, Seow Teong Teck, it was a forgery.

It is also admitted that, speaking generally, a forgery is a nullity in law, and nothing can pass thereunder.

In the Colony where registration of title does not exist, nothing would have passed under the transfer.

In Johore, the system of conveyancing is different from that which prevails in the Colony, or in England, or in the Federated Malay States, or in Australia, and it is impossible to compare the rights arising under a transfer in Johore, with those arising under a transfer of property in any of the other jurisdictions mentioned. For these reasons, the cases referred to in argument on behalf of the plaintiff have little bearing on the present case, and they will only be referred to on behalf of the 2nd defendant in order to show the differences existing between the law of Johore and the law obtaining in the other jurisdictions referred to.

The following among other authorities were then referred to: — *Cooper* v. *Vesey*, 20 Ch. Div. 611; *Kerr* on the Principles of Registration, 1st edition, 1927, pp. 166, 167; the F.M.S. Regulation for Registration of Title, 1891 and the F.M.S. Registration of Title Enactments of 1911 and 1930; *Gibbs* v. *Messer*, [1891] App. Cas. 248; *Asssets Co.* v. *Mere Roihi*, [1905] App. Cas. p. 176; *Hogg* on the Australian Torrens System; *Innes* on Land Registration and *The Port Swettenham Rubber Co., Ltd.* v. *Loke Yew*, reported therein at p. 244; *Allagappa Chettiar* v. *Ng Guan Yin*, 5 F.M.S.L.R. p. 236; *Lim Pang Geok's* case reported in *Innes* at p. 90; *Ong Lian* v. *Tan Eng Jin*, 1 F.M.S.L.R. p. 325.

Most of the above-mentioned cases relate to a system or systems of conveyancing different from that in Johore, and it is only the law of [206] Johore (the Land Enactment) which is really relevant. See *The Commissioner of Stamps* v. *Oei Tjong Swan*, [1933] App. Cas. 378 at p. 387; [1933] S.S.L.R. 436; [1933] M.L.J. 107. [206]

In Johore, a system of registration of title exists. Such system may not incorporate features incorporated in the law of other jurisdictions which have adopted registration of title, but the objects of all registration systems are similar. See *The Port Swettenham* case — *Innes* at p. 254.

In Johore, rights *in rem* in land depend entirely on registration, and registration is distinct from act of parties, or operation of law. It is a ministerial act, and although for a transfer in Johore the act of parties is just as necessary as it is in any other jurisdiction, it is not the act of the parties, i.e. it is not the instrument of transfer, which passes the right *in rem*. The instrument of transfer, without registration, confers no right *in rem*, although it confers a right in contract.

As a consequence, although in the Colony a transfer which is a forgery, and therefore a nullity, passes no right, it is submitted that in Johore, if a forged transfer is registered, the act of registration

confers a right on the transferee. It is also submitted that a forged transfer is an "instrument" within the meaning of sections 58 and 59 of the Land Enactment, and that on registration of such transfer, the land passes, notwithstanding that the transfer is forged. Such a title is open to attack in Johore just as it would be in any other country where registration of title exists, and can be set aside, but if a person gets on the register by means of a forged transfer, he becomes a "proprietor" within the meaning of the Land Enactment — see definition of "proprietor," section 56(a) — and it is submitted that such a "proprietor" though only a *de facto* proprietor, is entitled to exercise the rights of a "proprietor," and that if he makes a transfer or charge, such transfer or charge is made in accordance with Part V of the Enactment, and upon being registered, is competent to pass the land, or render it liable as security under section 59.

In the present case, though Seow Teong Teck the 1st defendant got on the register by means of a forged transfer, he did in fact, though not in law, become the "proprietor," under section 56(a). The charge he made in favour of the 2nd defendant Kathiresan Chettiar was regular under section 62, and when such charge was registered, the land became liable as security under section 59.

A comparison of the Land Enactments of the F.M.S. with the Land Enactment of Johore, and of the law of the F.M.S. with the law of Johore, show that although the law of Johore in connection with title to land is based upon the law of the F.M.S. (see *Allagappa Chettiar* v. *Ng Guan Yin, supra*), it was not necessary in Johore to reproduce in the Johore Land Enactment some of the sections which are contained in the Registration of Titles Enactment of the F.M.S.

In the F.M.S., certificates of title are granted in respect of land. No certificates of title are issued in Johore, in which State title depends upon a grant or lease direct from the Sultan, and such grants and leases are in their nature indefeasible. This essential difference between the law of the F.M.S. and the law of Johore, accounts for the omission from the Johore Land Enactment of such sections as sections 7 and 8 of the Registration of Titles Enactment, and the addition to the law of the F.M.S. effected by the amendment of section 30 of the Registration of Titles Enactment in 1913.

It is true that the Court of Johore has power to grant relief under section 59 of the Land Enactment in every case of fraud, and that in Johore there is no law to limit the Courts' powers as they are limited in the F.M.S. by sections 8 and 30 of the Registration of Titles Enactment, but the question in this case is, whether in granting relief against fraud, in a State in which the system of conveyancing depends on registration of title, the Court should exercise its jurisdiction so as to nullify the object and ordinary effect of registration, and the security of title afforded by registration. In such a case it is submitted that the law should prevail, and that although the transfer to Seow Teong Teck cannot be upheld, section 59 of the Land Enactment should be held to validate the charge made by Seow Teong Teck in favour of Kathiresan Chettiar, and duly registered, and render the land liable as security in accordance with the provisions of section 59.

Laycock (*M. V. Pillai* with him) for the 3rd defendant:—

Forgery is not a nullity in this sense that in some cases a forged document has the same legal effect as a properly executed one. The real question in this case is this, is the Johore land system a true system of registration of title? If so, all neecssary consequences flow from that fact. In Johore the system is in fact a modification of the Torrens System. In Johore we should not expect to find all the same incidental details which we find in the systems of Australia, New Zealand (4–5 systems) or even in the F.M.S., where regulations go back to 1891. Johore is a country which has been developed much later. In Johore there did not exist prior to the Land Enactment, 1910 the same grants and miscellaneous titles to land as existed in the F.M.S. or in Australia prior to the adoption of Land Registration. Under a system or registration of title land "lies in registration" just as [207] truly as in [207] England it "lies in grant" and formerly "lay in livery." The essentials of a complete system of registration of title are set out in *Hogg* on Registration of Title (1920 Edn.) at p. 2.

1. The land is initially placed on the register as a unit of property.

2. Transactions are registered with reference to the land itself and not merely as instruments executed by the owner.

3. Registration of transactions is essential to their validity.

4. Registration, initial or of subsequent transactions, acts in some degree as a warranty of title in the person registered as owner, and as a bar to adverse claims.

All these characteristics are present in the Johore system.

With regard to *Hogg's* four characteristics there can be no argument about 1, 2 and 3. With regard to No. 4 it is submitted that No. 4 is also fully present present in the Johore law. All that *Hogg* requires is that registration "acts in some degree as a warranty of title." It is obvious there can be such a warranty without express words stating that it is a warranty. The Johore Land Law provides that nobody except the registered proprietor can deal with registered land. It also goes on to provide that the registered proprietor can deal with registered land in any manner allowed by the Land Enactment. Thus, the registered proprietor is given the fullest power to deal with land that any one can have by law; and no one except the registered proprietor can deal with the land at all. This constitutes in fact a complete warranty and recognition of the title of the registered owner. It is the complete dominion over the land and confers the fullest rights that any proprietor can get over the land; therefore there is no need for the use of words such as "indefeasible." A "certificate of title" is not in any way a necessary concomitant of a true system of registration of title. It is obvious that in a system of registration of title no document is necessary except the register itself, though no doubt it is very convenient and very desirable for all practical purposes to have some document or copy of document

for the use of the owner. Even a certificate of title is merely a statement by the Registrar certifying what are the contents of the register; and even a grant after all is an official copy of a document on the register.

Once the proprietor's name is on the register as a registered proprietor it is really not in any way material for the validity of any transaction whether there is or is not a grant or certificate of title in his possession.

If the register is the "mirror of title" as was decided by the Court of Appeal in *Tan Ah Boon's* case, [1934] M.L.J., p. 150 then evidently the presence or absence of a grant or certificate of title is immaterial.

With regard to the certificate of title again it is to be noted that the Torrens system originated in Australia a country where there was already in existence a complicated system of titles based upon deeds. To effect registration these earlier and complicated titles had to be surrendered. Then either new grants had to be issued or certificates of title in their place. The essence of the Torrens system in Australia is that by bringing land on to the register a new kind of title is created. But in Johore as shown by the Court of Appeal in *Tan Ah Boon's* case there was no need for creation of such new titles as all titles in Johore now commence with a grant, lease or entry in the Mukim Register.

If there is a true system of registration of title, then all persons are entitled to deal with the registered proprietor relying on the contents of the register. This does not arise out of any local peculiarities in local legislation; but is of the very essence of Registration of Title. "The system is intended to confer indefeasible title upon those who deal with a person actually registered and deal with him on the faith of the register." *Gibbs* v. *Messer,* [1891] App. Cas. 248. The *ratio decidendi* of the case of *Ong Lian* v. *Tan Eng Jin & another,* 1 F.M.S.L.R. 325 is fully applicable to this case. "Even a forged transfer will when duly entered on the register become the root of a valid title in a *bona fide* purchaser." *Loc. cit.* p. 330: "These remarks," says Mr. Hogg in his learned work on the Torrens system, "apply to the Torrens system generally. There is nothing in the Johore system to differentiate it from the other known Torrens systems in this respect."

He referred to sections 56A, 57, 59, Land Enactment, 1910. See *Hogg* (1905) p. 106; New South Wales Act, section 41 p. 188; Queensland Act, section 43, p. 271; New Zealand Act, section 36, p. 348; South Australian Act, section 67, p. 430; Tasmanian Act, section 39, p. 515; Victorian Act, section 63, p. 616 and West Australian Act, section 58, p. 674; Fijian Act, section 39. See *Ong Lian* v. *Tan Eng Jin and anor.,* 1 F.M.S.L.R. 325 at p. 332. *Tan Ah Boon, supra,* at p. 151, *Hogg* (1905) p. 789. *Gibbs* v. *Messer,* [1891] App. Cas. 248 and to *Kerr* on Australian Land Titles System (1927), pp. 6 – 7. See *Haji Abdul Rahman* v. *M. Hassan,* [1917] App. Cas. 209. He cited *Assets Co.* v. *Mere Roihi,* [1905] App. Cas. 176; *Davis* v. *Bank of England,* 2 Bing. 393; 130 E.R. 363 at p. 407; *Bank of England* v. *Cutler,* [1907] 1 Q.B. 889 at p. 908; *Jones* v. *Powles,* 40 E.R. 222 at p. 228; *Carter* v. *Carter,* 69 E.R. 1256 at pp. 1265, 1266; *Young* v. *Young,* 3 Eq. 801 at p. 805; *Carlisle Banking Co.* v. *Thompson,* 28 Ch. D. 398.

[208] *K. K. O'Connor,* in reply: — It is not correct that interests in land are transferred *by* registration. *Inter vivos* what effects the passing or the liability is an "instrument" made in accordance with the Enactment which takes effect upon registration. So under the Land Transfer Acts in England. But if, as argued, it is the *registration* which passes the land, then the registration would be a "dealing." And registration of a forgery would be a nullity under section 57. [208]

The conclusive effect given to a Certificate of Title in some jurisdictions is part of the express protection given to *bona-fide* transferees. *Kerr* on the Australian Land Titles (Torrens) System (1927 edn.), p. 166. *Assets Co.* v. *Mere Roihi, supra,* at pp. 193, 194. The same effect can be produced without a Certificate of Title (e.g. F.M.S. *Registration of Titles Enactment,* 1911, section 30); but there must be some express protection in the statute.

It is immaterial that the *original* title may be indefeasible. All Crown grants or leases are to some extent indefeasible; but that does not enable a stranger to transfer a good title to the land by forgery.

We are here concerned with the transferred, or substituted title. The point is, does the Enactment guarantee the transferred title?

As to *Loke Yew's* case (*Innes* p. 251) the *ratio decidendi* appears from pp. 251, 259. The memorial is conclusive because the Enactment made the Certificate of Title conclusive. This depends on the existence of section 7.

As to *Alagappa Chetty* v. *Ng Guan Yin,* 5 F.M.S.L.R. 236, Part V of the Johore Enactment may be "based" or "modelled" on the F.M.S. Enactment of 1911, but there are very important differences.

To argue that a provision corresponding to section 8 of the Registration of Titles Enactment, 1911 (conclusive effect of Certificate of Title) has been omitted in Johore because it is unnecessary, having regard to sections 74, 77 and 79 of the Evidence Ordinance, is to say that because a certified copy can be used to prove the contents of a public document, that is the same thing as enacting that the public document when proved is conclusive as to its contents. Incidentally, the Evidence Enactment is in force also in the F.M.S. And most original titles are indefeasible in the F.M.S.

As to section 90H of the Johore Land Enactment, this applies only to Court sales. In that instance the Johore Legislature has granted some measure of indefeasibility by express words. You cannot assume from that, as you have been invited to do, that the omission of any corresponding provision in Part V was made *per incuriam.*

As to *State of Johore* v. *Tan Ah Boon,* [1934] M.L.J. 142 at p. 150 a distinction is drawn between lands held under extract from the Mukim Register

and lands held under Grants and Leases. In the case of an extract, the first entry creates the title. In the case of a grant or lease, the duplicate of the original becomes the commencement of the register. "Mirror of title" if that phrase is applied to land held under grant, only means that the register reflects the title, not that it is the title.

It is argued that a principal object of the Johore Enactment is to give security of title by registration. You cannot presume that. The object must be gathered from the terms of the Enactment. There is no preamble.

You cannot say that there is a system of Registration of Title in Johore and that everything flows from that. You must examine the Enactment and see what, in fact, the system is, irrespective of what it is called. Mr. Laycock relies on *Hogg* (1920 edition) to show that there is a complete system of registration of title in Johore; but in fact *Hogg* would not classify the Johore system as a proper system of registration of title. It does not contain his fourth characteristic "warranty of title . . . . and a bar to adverse claims." (*Hogg* (1920 edn.) pp. 1, 2, 3, 4, 5). *Hogg's* remarks on pp. 136 and 142 to 145 refer to statutes which contain an express warranty of title.

As to the argument that registration, in a jurisdiction where Registration of Title obtains, is equivalent to getting in the legal estate in unregistered land, this does not apply where the vendor to the subsequent purchaser had no title — e.g. where he took under a forgery — unless the asserted or apparent title was clothed with possession. (*Kerr* on Fraud and Mistake, p. 455) *Jones* v. *Powles,* 3 M. & K. 551; *Carter* v. *Carter,* 3 K. & J. 617; *Young* v. *Young,* 3 Eq. 801 all depend on possession. Here the chargees never had possession. But it is very doubtful if any such English rule would apply in Johore. In England the rule applies to purchasers or mortgagees to whom the legal estate in land has passed by conveyance or legal mortgage. No land passes to a chargee in Johore. If English rules are to be applied, the plaintiff still has the legal estate.

The instances cited by Mr. Laycock to show that forgery is not a nullity, e.g. *Bills of Exchange Act,* 1882, section 60; *Hume Dick* v. *Herries Farquhar & Co.,* (1888) 4 T.L.R. 541; *Davis* v. *Bank of England,* 2 Bing. 393. *Bank of England* v. *Cutler,* [1907] 1 Q.B. 889, are all cases of estoppel and do not affect this case.

The 3rd defendant has not proved that he gave value *bona fide* and without notice.

Mills J.: The facts admitted or found by the Court were as follows:—

One Seow Eng Tin was the registered owner of two pieces of land (which I will call "the land") held under Grants Nos. 12364 and 12365.

He died on the 17th October, 1929.

[209] [209] His widow, Tan Keng Neo, obtained probate of his will in the Straits Settlements and the grant of probate was sealed in Johore: she was registered as the proprietor of the land "as representative" on the 11th May, 1933. Being old, illiterate and unaccustomed to business, Tan Keng Neo on the 21st February, 1930, gave a power of attorney to her adopted son, Seow Teong Teck (the first defendant) to act for her in all matters relating to the estate of Seow Eng Tin. She kept documents in a safe of which she held the key; from time to time she allowed Seow Teong Teck to remove documents for the purposes of the estate affairs, but being illiterate she was unaware what documents he removed or what he returned. On the ground that Grants Nos. 12364 and 12365 were required in connection with the assessment of the land under the Rubber Restriction Scheme, Seow Teong Teck caused her to let him remove those grants and retain them.

Tan Keng Neo did not do any act from which negligence was to be imputed to her.

On the 20th August, 1934, an unknown woman impersonating Tan Keng Neo signed a transfer purporting to transfer the land to Seow Teong Teck; she was identified by Seow Teong Teck to the attesting solicitor.

The transfer was a forgery, and Seow Teong Teck was guilty of actual fraud.

On the same day Seow Teong Teck signed a charge (which I will call "the first charge") purporting to charge the land to the second defendant (whom I will call "the first chargee").

The transfer was registered (Presentation No. 67230) by the Commissioner at Johore Bahru on the 22nd August, 1934: the first charge (Presentation No. 67231) was registered immediately afterwards.

On the 10th September, 1934, Seow Teong Teck signed another charge (which I will call "the second charge") purporting to charge the land to the second defendant: this charge was registered (Presentation No. 67462) by the Commissioner on the 11th September, 1934.

In connection with the first two charges, the first chargee was represented by his attorney, Narayanan Pillay. On the 7th November, 1934, Seow Teong Teck signed another charge (which I will call "the third charge") purporting to charge the land to the third defendant (whom I will call "the second chargee"): this charge was registered (Presentation No. 68232) by the Commissioner on the 10th November, 1934.

The second chargee himself transacted the business in connection with the third charge.

Neither the first chargee nor the second chargee did any act from which negligence was to be imputed to either of them. The first defendant, the chargor, Seow Teong Teck, was not at material times in possession of the land: Tan Keng Neo was in possession by her manager, E Yean Kiat.

On the 17th December, 1934, Seow Teong Teck failed to return to his usual place of residence: he has not been seen since: on the 26th January, 1935, a warrant was issued for his arrest.

The first chargee has proved that he was a *bona fide* chargee for value without notice: the second chargee has not proved that he was a *bona fide* chargee for value without notice.

Tan Keng Neo died during the trial of the suit, on the 11th September, 1935: Quah Hong Lian Neo obtained letters of administration *de bonis non administratis* of the estate of Seow Eng Tin on the 9th November, 1935, and was substituted as plaintiff by order of Court dated the 14th December, 1935:

Such being the facts, what is the legal position? First of all it is necessary to construe section 39 of the Land Enactment, 1910: that section reads as follows:—

("No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land, or any interest therein, or render such land liable as security for the payment of money; but, upon the registration of any instrument in manner hereinbefore prescribed, the land specified in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument; but so that nothing contained in this Enactment shall take away or affect the jurisdiction of the Court on the ground of fraud.")

In my opinion the concluding clause (which I will call "the Proviso") is of the greatest importance.

It is a generalisation couched in wide terms, and I can see no reason why the most extended meaning should not be given to the words "jurisdiction" and "fraud": that is to say, the word "jurisdiction," should be construed to mean every aspect of "jurisdiction," including "extent of jurisdiction," and "exercise of jurisdiction" and the word "fraud" should be construed to mean every aspect of "fraud" including "constructive fraud" and "actual fraud": moreover the "fraud" mentioned in "the Proviso" must not, in my opinion, be restricted to the fraud by any particular person: if the Legislature had intended to refer to the fraud of a particular person, it would have said so, just as in section 90H(i) it specifies "fraud to which the purchaser is proved to be a party."

I here emphasise that section 59 does not contain any such provision as appears at the end of section 90H(i) "provided that nothing in this sub-section shall affect the title of any proprietor, chargee or lessee who who has taken *bona fide* for valuable consideration from such purchaser, or of any persons claiming under such proprietor, chargee or lessee": the exclusion of such provision from section 59 appears to me to be highly significant.

[210] [210] To revert to "the Proviso": whether or not I am right in thinking that "fraud" includes "constructive fraud," I have no hesitation in finding that the action of Seow Teong Teck amounts to "actual fraud," and therefore beyond question "fraud" within the meaning of "the Proviso." I have already stated that in my opinion "the Proviso" must be construed to mean that the contents of the Land Enactment are not to affect the exercise of the Court's jurisdiction on the ground of fraud: in other words, I interpret "the Proviso" as a direction to the Court that it must exercise its jurisdiction on the ground of fraud in the same manner as if this Enactment had not been passed.

What, then, ought to be the determination of the Court in the present case if the Land Enactment had not been passed?

As I understand it, the position is as follows:—

A. The forged transfer to Seow Teong Teck is a nullity: in England a forged transfer is void at common law (*cf. Gibbs v. Messrs,* [1891] App. Cas. at p. 257); in the Federated Malay States it is a nullity (*cf. Innes.* A Short Treatise on Registration of Title in the Federated Malay States, at p. 91); I have no hesitation in holding that the same rule applies in Johore.

B. As Seow Teong Teck obtained no rights by virtue of the forged transfer, he had no rights, by reason of the maxim *nemo dat quod non habet,* to hand on to the chargees: therefore the charges, at any rate so far as they affect the land supposed to be charged, are a nullity.

My conclusion is that in the present case the Court ought to hold that the charges are a nullity.

But my view that the Land Enactment must not be taken into consideration, may be wrong: I therefore give two other reasons why, in my opinion, the rights of Tan Keng Neo ought to prevail over those of the chargees.

In the first place, I am of opinion that on a true construction of section 59, the land did not pass to the chargor, notwithstanding the registration of the transfer: for since the transfer was a forgery, it was not, in my opinion, an "instrument" within the meaning of section 59: to adapt and adopt the language used in the case of *In re Cooper* (20 Chancery Division at p. 634), the transfer was a document to which anyone except the person who executed it and persons claiming through her, could successfully plead *non est factum*: no right or interest can possibly pass by such a document, and no title under section 59 can arise out of it.

If the chargor had no right to charge, the charges are a nullity.

If however the land does not pass by virtue of section 59, the Court must consider whether in exercising its jurisdiction on the ground of fraud, it ought to prefer the claim of Tan Keng Neo or of the chargees.

I cannot see that the chargees have any better equitable claim than Tan Keng Neo.

Assuming that registration of the charges is to be regarded as the equivalent of getting in the legal estate in unregistered land, yet that will not assist the chargees in the present case; for here the chargor, since the transfer was a forgery, acquired no rights under it, and in such a case the legal estate constitutes protection only if the pretended title was clothed with possession and if the falsehood could not have been discovered by reasonable diligence. (*Halsbury's* Laws of England, 2nd edn., vol. 13, p. 100, para. 90).

In the present case, however, Seow Teong Teck had possession, and therefore the legal estate will not protect the chargees.

Unless the chargees have a better equitable claim than Tan Keng Neo, the Court must prefer the latter whose equity is prior in time — *qui prior est tempore, potior est jure.*

I now consider the gist of certain lengthy arguments put forward in support of the proposition that the charges are legally valid.

I point out that in so far as these arguments rely on the provisions of the Land Enactment, 1910, they ought to be rejected, because in my opinion the Land Enactment ought not to be taken into consideration.

First, it is argued —

(1) a grant is indefeasible;

(2) in the Federated Malay States it has been held that a Certificate of Title is of equal value with a grant and that a memorandum of transfer has the same effect as a Certificate of Title;

(3) therefore a memorandum of transfer gives an indefeasible title.

I must reject that argument because, *inter alia* —

(a) a grant is not indefeasible: under section 20c the Court may order a grant to be cancelled;

(b) "The Proviso" in section 59 expressly preserves the jurisdiction of the Court, and in the exercise of that jurisdiction the Court may make an order which defeats the title.

Secondly, it is argued that —

(1) section 90H(i) expressly protects the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from a purchaser at a sale of land sold under section 83;

(2) it is logical that all proprietors, chargees and lessees who have taken *bona fide* for valuable consideration should be protected in the same way;

(3) therefore it is the intention of the Legislature to extend a similar protection to all such proprietors, chargees and lessees.

[211] [211] I must reject that argument because in my view this provision applies only to sales under section 83, and the fact that no such provision is enacted elsewhere makes it eminently clear that the Legislature did not intend that this provision should be of universal application.

Thirdly, it is argued that any person who is registered as owner has the right, under section 62(i), to execute a charge, and by virtue of section 59, the land in question shall become liable as security upon registration of the charge.

I must reject that argument because in my opinion, section 62(i) is a mere "procedure" section, corresponding, in the case of mukim register titles, to section 43; it does not purport to specify any rights of the registered owner, which in the case of mukim register titles, are set out in section 35; it specifies obligations rather than rights; I find it impossible to believe that the Legislature intended, when imposing such obligations, inferentially to confer upon a proprietor rights which are not given to him in any other section of the Enactment; the context requires that the strict meaning given to "proprietor" in section 56A should not be applied to the word in section 62(i); the word "proprietor" in section 62(i) means no more than "person" in section 43(i), and in both cases the rightful owner of the land is referred to.

Fourthly, it is argued —

(1) in Johore a system of registration of title exists;

(2) a principal object of registration of title is to ensure that people can rely on the register;

(3) the chargees transacted in reliance on the register;

(4) therefore the Court ought to hold that the charges are valid.

I must reject that argument because it must depend on the terms of the Enactment how far the Legislature intends that people shall be able to rely on the register: and in my opinion the terms of the Enactment do not justify the conclusion that the Legislature intended, in circumstances such as exist in this case, that the charges should be valid: I have already expressed my view as to the interpretation of the Enactment in this respect.

In any case this argument cannot apply to the first charge; for the transaction took place on the 20th August, 1934, whereas the chargor was not registered as owner until 2 days later and therefore it was impossible for the first chargee on the 20th August to rely on the entry in the register, because that entry had not yet been made.

Fifthly, it is argued —

(1) in Johore a system of registration exists;

(2) the main object of registration of title is to ensure that people can rely on the register, which is the mirror of title;

(3) that object is defeated unless it is held that the Enactment (even without express words) warrants the title and makes it indefeasible;

(4) therefore the Court should hold that the chargees' titles are indefeasible.

I must reject that argument because section 59 expressly states that the Court shall retain its jurisdiction on the ground of fraud, and in the exercise of that jurisdiction the Court may avoid a transaction, so it is clear that registered titles are not indefeasible.

One has only got to look at *Hogg's* book on the Registration of Title to land throughout the Empire, to see that the registration statutes do not even purport to make the register completely conclusive, but in everyone of them there are express exceptions (*cf.* p. 94).

Hogg does not refer to Johore in his book, and this may well be due to the fact that in his view the Johore Enactment does not provide what Hogg lays down as his fourth characteristic (p. 2), namely, "Registration, initial or of subsequent transactions, acts in some degree as a warranty of title in the person registered as owners and as a bar to adverse claims."

I am afraid I cannot attach any importance to the use of the expression "mirror of title" by the Court of Appeal (*cf. The State of Johore* v. *Tan Ah Boon*, [1934] M.L.J. 150) because I have been unable to discover any definition or description of that expression; and as the Court of Appeal uses the expression in connection with the mukim register, it may perhaps be inapplicable to the "Register of Titles" kept under section 58.

Sixthly, it is argued that the Court should prefer the claim of the chargees on the ground that they are *bona fide* purchasers for value without notice, especially as they have procured the registration of their rights, which is to be regarded as equivalent to getting in the legal estate. I must reject that argument, because, as I have already stated, getting in the legal estate will not assist the chargees in this case since the pretended title of the charge was not clothed with possession, and because, since the equity of the chargees is no better than that of Tan Keng Neo as previously-registered owner, the Court must prefer the equity of Tan Keng Neo as being prior. In any case this argument cannot apply to the second chargee

because he has not proved that he was a *bona fide* purchaser for value without notice; and without such proof the Court ought not, in my opinion, to presume that the second chargee was such a purchaser.

I wish to emphasise once more that though the Land Enactment, 1910, has been amended at least 10 times, and though an amendment passed in 1933 introduces, in section 90H, an express exception "in the case of fraud to which the purchaser is proved to be a party," and gives overriding protection, on a [212] sale of land under [212] section 83, to the "proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from such purchaser," yet the Enactment contains no provision extending this protection in other circumstances and no provision referring to indefeasibility of title or State warranty of title. In my opinion the Court must conclude that the exception and the protection specified in section 90H shall apply only to the special circumstances with which that section deals, and must conclude that the Legislature did not intend to make provision for indefeasibility of title or for State warranty of title in general.

I have endeavoured to give full appreciation to all points raised on behalf of the chargees, but I must admit difficulty in extracting the substance of long and involved arguments interwoven with continuous references to foreign laws and foreign decisions.

In particular I have examined the interesting cases cited by counsel for the third defendant in support of the position that forgery is not always a nullity; but I am satisfied that there is nothing in those cases which will substantiate the claims of the claims of the chargees under the circumstances now before the Court.

At the risk of being tedious I am obliged to stress the fact that it is the Johore Land Enactment, 1910, which regulates the rights of the parties; just as the Court of Appeal in the Federated Malay States points out that the English Land Transfer Acts are not modelled closely on the Australian Acts and that the Negri Sembilan Enactment does not substantially differ from the Australian Torrens Acts (*cf.* 1 F.M.S. Law Reports at pp. 332 and 335), so I must point out that the Johore Land Enactment, 1910, is not modelled closely on the Australian Torrens Acts and does substantially differ from them.

On the whole case my conclusion is that the claims of Tan Keng Neo and therefore of the substituted plaintiff Quah Hong Lian Neo ought to be preferred to those of the chargees.

The Court has a discretion under the Specific Relief Enactment to grant or refuse the equitable relief which is asked for, but in my opinion no sufficient reason has been shown to justify the Court in refusing it; nor would such refusal be of any advantage to the defendants, since, if I am right in holding that the transfer and charges are a nullity, the defendants could not successfully sue on those documents.

On the 20th April, 1936, I delivered a formal judgment specifying the relief to which, in my opinion, the plaintiff was entitled, and making an order as to costs by agreement between the parties.

One other question remains, whether the Court ought to order the plaintiff to repay the chargees the sums advanced upon the charges.

In my opinion the answer must be in the negative; for three reasons:—

1. In considering which of two innocent parties ought to suffer, I have decided that the claim of Tan Keng Neo ought to be preferred; it would stultify that decision if I now ordered the loans to be repaid, for such an order would remove the burden of suffering from the shoulders of the chargees and impose it on the shoulders of the plaintiff;

2. Tan Keng Neo has not been guilty of any negligence amounting to a neglect of duty and therefore ought not to be saddled with any responsibility for the loss which the chargees have incurred through the transaction, *cf.* the judgment of Innes J.C. in *Lim Pang Geok* v. *N. M. A. Sokalingam Chetty,* reported in *Innes'* A Short Treatise of Registration of Title in the Federated Malay States;

3. I feel bound to follow the rule in *Farhall* v. *Farhall,* (7 Chancery Appeals, p. 123) which lays down that when an executor borrows money on behalf of an estate, the executor and not the estate is liable to repay the debt; if the estate of Seow Eng Tin is not legally liable to repay the moneys borrowed by the attorney of the executrix from the chargees, I do not think the Court would be justified in ordering that the chargees should receive compensation from the plaintiff who now represents the estate.

Judgment accordingly.

Solicitors: *Drew & Napier; Sisson & Delay; Pillai & Co.*

---

[213] STRAITS SETTLEMENTS REPORTS [213]

PUBLISHED BY AUTHORITY

VOO FOOT YIU v. OVERSEA CHINESE BANKING CORPN., LTD.

[O.C.J. (Whitley Ag C.J.) July 3, 1936]
[Singapore Suit No. 547 of 1935]

Banker's deposit — Necessity of return of receipt before deposit can be withdrawn.

The form of banker's deposit receipt commonly issued by bankers in Singapore provides that the money deposited is only to be paid out to the depositor on production of the deposit receipt, the words used being "repayable on production of this receipt."

A deceased person during her lifetime deposited money with the defendant bank. After her death letters of administration were granted to one Yip Swee who fraudulently represented that he was the deceased's husband and as administrator of the deceased he then demanded payment of the money due from the defendants on the deposit receipt. The defendants paid him as administrator. The letters of administration granted to him were subsequently recalled. A new grant was made to the husband of the lawful daughter of the deceased who then sued the bank for the money; she produced the receipt.

Held: that the defendants were not entitled to pay the former administrator in the absence of the deposit receipt.

TRIAL OF ACTION.

Davies for the plaintiff.

Vaux for the defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.